Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

SETH E. SICROFF,

Petitioner,

v.

STEPHEN C. JETT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a debt for libel is nondischargeable under Section 523(a)(6) of the Bankruptcy Code, which exempts from the discharge debts for "willful and malicious injury," when the debtor believed the libelous statement to be true when it was made.

PARTIES TO THE PROCEEDING

The petitioner is Seth E. Sicroff, the debtor and defendant-appellee in the courts below. The respondent is Stephen C. Jett, plaintiff-appellant in the courts below. The Office of the United States Trustee was denominated as a party to the proceedings in the Court of Appeals but did not participate in the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Seth E. Sicroff respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reversing the judgment of the district court, is reported at ___ F.3d ___, 2005 WL 665251 (9th Cir. Mar. 23, 2005), and is reproduced at App. 1a–11a. The opinion of the United States District Court for the Eastern District of California, affirming the judgment of the bankruptcy court, is unreported and is reproduced at App. 13a–23a. The opinion of the United States Bankruptcy Court for the Eastern District of California is unreported and is reproduced at App. 25a–27a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 523(a) of the Bankruptcy Code provides in pertinent part:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt— . . . (6) for willful and malicious injury by the debtor to another entity or to the property of another entity..

11 U.S.C. § 523(a).

INTRODUCTION

The fundamental purpose of the bankruptcy laws is to provide the debtor with a fresh start. *See, e.g., Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). To that end, the Bankruptcy Code provides that an eligible individual debtor who fulfills the Code's requirements will receive a discharge of his prepetition indebtedness. *See* 11 U.S.C. § 727. Although Section 523(a) of the Bankruptcy Code sets out certain exceptions to that rule, those exceptions are strictly construed and "should be confined to those plainly expressed." *Gleason* v. *Thaw*, 236 U.S. 558, 562 (1915).

The exception at issue in this case provides that debts for "willful and malicious injury by the debtor" are nondischargeable. 11 U.S.C. § 523(a)(6). In *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998), this Court held that the "willful and malicious injury" exception applies only if the debtor had "the actual intent to cause injury," and that an injury is not "willful and malicious" merely because it results from "a deliberate or intentional *act*." *Id.* at 61 (emphasis in original). Accordingly, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.* at 64.

In this case, the Ninth Circuit held that a debt for libel was a debt for "willful and malicious injury" and thus non-dischargeable under § 523(a)(6). It did so even though the bankruptcy court had made a factual finding—undisturbed on appeal—that the debtor believed his statements to be true when he published them. And it did so even though California law requires no more than a finding of negligence as to truth or falsity to support a libel verdict—and no court below ever found (or suggested that the record would support a finding) that the debtor was more than negligent in believing his statements to be true.

The Ninth Circuit reached that holding only by employing a tortured analysis of the "willful and malicious injury" exception that conflicts with the analysis employed by other courts of appeals and with this Court's decision in *Geiger*. Disaggregating the "willful" and "malicious" elements of the exemption, the Ninth Circuit first held that the "willful" element was satisfied based on the debtor's concession that he had intentionally published the statements in question. App. 8a. The court then declared—relying on pre-*Geiger* case law—that the injury was "malicious" because the act of publication was intentional, caused injury to reputation, and was done "without just cause and excuse." App. 8a–10a. The court made clear that, in determining whether the libelous statements were "malicious," it did not inquire into whether Sicroff intended to cause legally cognizable injury to Jett. App. 8a–9a.

The Ninth Circuit's analysis was premised on a misguided, and unduly narrow, interpretation of this Court's decision in *Geiger*. Although *Geiger* made quite clear that an injury is "willful and malicious" *only* if the debtor intended to cause legal injury, and not if the debtor acted negligently or even recklessly, the Ninth Circuit wholly failed to acknowledge that holding. And it implausibly read *Geiger* to leave intact much of the Ninth Circuit's pre-*Geiger* caselaw, under which conduct was "malicious" if it lacked "just cause and excuse," and no intent to injure was required.

By contrast, the Fifth Circuit has given much broader effect to *Geiger*, holding that the "lacking just cause and ex-

cuse" standard for malice—widely employed prior to *Geiger*—did not survive that decision. *See Miller* v. *J.D. Abrams Inc.* (*In re Miller*), 156 F.3d 598, 605-606 (5th Cir. 1998). Rather, as the Fifth Circuit has explained, in order for an injury to be either "willful" or "malicious," *Geiger* requires a showing that legal injury was actually intended by the debtor or so certain to result that the injury is deemed intentional. *See id.* at 606. The Ninth Circuit panel below acknowledged the conflict of authority and expressly rejected the Fifth Circuit's reading of *Geiger*. App. 10a n.4.

Similarly, the decision below is in direct conflict with the Sixth Circuit's decision in *Wheeler* v. *Laudani*, 783 F.2d 610 (6th Cir. 1986), which held that a defamatory statement is "willful and malicious injury" under § 523(a)(6) only if the debtor knew the statement was false when it was made. *See id.* at 615. It is also at odds with the Sixth Circuit's decision in *Kennedy* v. *Mustaine* (*In re Kennedy*), 249 F.3d 576 (6th Cir. 2001), which held that a libel debt was nondischargeable precisely because the debtors continued to make their statements even after receiving clear proof that the statements were false. *See id.* at 581, 582-583.

The Ninth Circuit's decision saps *Geiger* of its meaning. Under the decision below, an injury is "willful" so long as it proceeds from an intentional act. Likewise, as the panel declared, under its definition of "malicious," "it is the wrongful act that must be committed intentionally rather than the injury itself." App. 8a–9a. Under this analysis, nondischargeability becomes the rule, to be overcome only upon a showing of "just cause or excuse."

For all these reasons, this Court should grant certiorari to review the Ninth Circuit decision below.

STATEMENT OF THE CASE

1. Petitioner Sicroff was a graduate student in the Geography Department at the University of California at Davis. Protesting the university's decision to close the department, he wrote a letter to various university officials, with copies to the local newspapers. Claiming to reveal the "real motivation" for closing the department, Sicroff wrote:

> [T]he old guard of the geography department has plagued [the administration] with a continuous barrage of specious complaints about [the new department chair]. In particular, Prof. Stephen Jett and Prof. Conrad Bahre have been relentless in their accusations against the new chairperson, even while they themselves have been the subject of numerous and well-substantiated charges of unprofessional conduct.
>
> Too weak to fire or even discipline tenured faculty, no matter how serious their misbehavior, you have taken this opportunity to rid yourself of a burr under your saddle. Shame on you, and shame on us all if we put up with it!

App. 2a–3a.

2. Based largely on the statements contained in the letter, Conrad Bahre and Stephen Jett (the Respondent) filed suit in California state court, alleging, as relevant here, that Sicroff's letter constituted libel under California law.[1]

Before the case was set for trial on the merits of the libel claim, Sicroff filed for bankruptcy under chapter 7 of the Bankruptcy Code, which had the effect of staying the state court litigation. *See* 11 U.S.C. § 362. Jett and Bahre thereupon initiated adversary proceedings in the bankruptcy case, seeking a determination that the debt Sicroff owed them was nondischargeable under 11 U.S.C. § 523(a)(6), which provides that a debt "for willful and malicious injury" is exempted from the bankruptcy discharge.[2]

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[1] The Sacramento County Superior Court referred the state law suit to binding arbitration. The arbitrator concluded that Sicroff had made defamatory statements against Jett and Bahre, and awarded both compensatory and punitive damages. On appeal, the state appellate court reversed the judgment—ruling that the trial court, in sending the case to binding arbitration over Sicroff's objection, had improperly denied him his right to a jury trial—and remanded for further proceedings.

[2] The bankruptcy court had jurisdiction over the adversary proceeding pursuant to 28 U.S.C. § 1334(b), which grants the district courts jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11," and 28 U.S.C. § 157, which grants the dis-

On motion by Jett and Bahre, the bankruptcy court lifted the stay, permitting further proceedings in state court. A settlement conference, however, was unsuccessful, and the state court ultimately determined to stay further proceedings on the underlying defamation claim pending a resolution of the nondischargeability adversary proceeding in the bankruptcy court.[3]

3. The bankruptcy court held a hearing on the nondischargeability issue. At the hearing, counsel for Jett contended that because Sicroff had intentionally made and published his statements, his conduct was willful, and that because libel was inherently malicious, his conduct was also malicious. Counsel for Sicroff conceded that Sicroff had intentionally made and published his statements regarding Jett, and that in this sense his conduct was "willful," but argued that Sicroff's mental state was not "malicious" within the meaning of § 523(a)(6) because Sicroff believed that the statements were true when he made them.

The bankruptcy court concluded that certain of Sicroff's statements about Jett were false, but held that the statements did not constitute "willful and malicious injury," because "[w]hile there can be no doubt that [Sicroff] intentionally and repeatedly published his untrue statements about [Jett], the evidence tends to show that he believed those statements were true." App. 26a–27a. The district court affirmed. App. 13a–23a.

4. The Ninth Circuit reversed. App. 1a–11a. The Ninth Circuit first concluded that the statements in Sicroff's letter constituted libel under California law, which defines libel simply as "a false and unprivileged publication by writing [or other means], which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be

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trict courts the power to refer such proceedings to the bankruptcy courts for that district, *see id.* § 157(a), and empowers bankruptcy judges to hear and determine, *inter alia*, "determinations as to the dischargeability of particular debts," *id.* § 157(b)(2)(I).

[3] Bahre subsequently dismissed his claims against Sicroff, leaving Jett as the only plaintiff.

shunned or avoided, or which has a tendency to injure him in his occupation." App. 6a (quoting Cal. Civ. Code § 45).[4]

Turning to the nondischargeability issue, the Ninth Circuit first noted that "[w]e analyze the willful and malicious prongs of the dischargeability test separately." App. 8a. Relying on Sicroff's acknowledgment that he had intended to make the statements in question, the panel reasoned that Sicroff had "conceded that his behavior was 'willful and intentional.'" *Id.* It thus concluded that Sicroff had inflicted "willful" injury on Jett, and that the bankruptcy court's contrary determination "was clearly erroneous." *Id.*

The Ninth Circuit then turned to the "malicious" prong. The panel reasoned that under its circuit precedent, an act is "malicious" within the meaning of § 523(a)(6) when it is "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." App. 8a (quoting *Petralia* v. *Jercich* (*In re Jercich*), 238 F.3d 1202, 1209 (9th Cir. 2001)). The panel stressed that "[w]ithin the plain meaning of this definition, it is the wrongful act that must be committed intentionally rather than the injury itself." App. 8a–9a (citing *Murray* v. *Bammer* (*In re Bammer*), 131 F.3d 788, 791 (9th Cir. 1997)).

Reasoning that a "libelous act, by its nature, is self-evidently wrongful and is committed by an intentional act of publication," the Ninth Circuit concluded that the first two prongs of this test were satisfied. App. 9a. As for the third element, the court concluded that "Sicroff's statements were directed at Jett's professional reputation and, therefore, will necessarily harm him in his occupation." *Id.* The court therefore reasoned that the "malice" inquiry turned on whether Sicroff had "just cause and excuse" for making the statements in question. *Id.*

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[4] While the California libel statute by its terms would impose strict liability for defamation, following this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the California Supreme Court has interpreted the statute to require private-figure plaintiffs to show that the defendant was at least negligent as to the truth or falsity of the matter asserted. *See Brown* v. *Kelly Broad. Co.*, 771 P.2d 406, 425 (Cal. 1989).

The court found that Sicroff did not have "just cause and excuse" for his actions, because after the newspaper edited out the references to Jett, he offered to identify the subject of his criticisms. App. 9a–10a. "This action demonstrates a specific intent to injure Jett over and above otherwise legitimate protest." App. 10a. Accordingly, the Ninth Circuit concluded that "Sicroff's libelous statements constituted a willful and malicious injury" and that "his debt to Jett is not dischargeable." App. 11a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FIFTH AND SIXTH CIRCUITS

Under the Ninth Circuit's reading of § 523(a)(6), a negligently made libelous statement is "willful and malicious"—and a resulting debt is thus nondischargeable in bankruptcy—even if the debtor believed his statements to be true and thus could not have intended to inflict any legally cognizable injury on the plaintiff.

That expansive construction of the "willful and malicious" exception to discharge presents a square and expressly acknowledged conflict with the Fifth Circuit's interpretation of that provision, under which an injury is neither "willful" nor "malicious" unless the debtor had the actual intent to cause legally cognizable injury. *See Miller* v. *J.D. Abrams Inc.* (*In re Miller*), 156 F.3d 598, 606 (5th Cir. 1998). It also decisively breaks with the Sixth Circuit, which has expressly held that a debt for libel cannot be a debt for "willful and malicious injury" if the debtor believed his statements to be true when they were made. *See Wheeler* v. *Laudani*, 783 F.2d 610, 615 (6th Cir. 1986); *see also Kennedy* v. *Mustaine* (*In re Kennedy*), 249 F.3d 576, 581, 582-583 (6th Cir. 2001) (finding debt for libel nondischargeable because debtors knew libelous statements were false).

A. The Ninth Circuit's construction of the "malicious injury" requirement, under which an injury may be malicious even if the debtor was merely negligent and had no intent to cause legally cognizable injury, presents a square conflict with the Fifth Circuit's holding that to satisfy the

"malicious" requirement, legally cognizable injury must have actually been intended by the debtor or so certain to result that the injury is deemed intentional. *See Miller*, 156 F.3d at 606. Negligent torts such as the one in this case cannot satisfy that standard. *See id.* at 603, 606. This openly acknowledged conflict—which was outcome-determinative in this case—represents an important disagreement about the meaning and application of this Court's decision in *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998).

Prior to this Court's decision in *Geiger*, a number of courts of appeals (the Fifth and Ninth Circuits among them) treated "willful" and "malicious" as analytically separate requirements. *See Miller*, 156 F.3d at 603 (noting that prior to *Geiger*, "courts . . . analyzed 'willful' and 'malicious' separately"); *Murray* v. *Bammer* (*In re Bammer*), 131 F.3d 788, 791 (9th Cir. 1997).

In the Ninth Circuit, prior to *Geiger*, an injury was "willful" if it stemmed from a "deliberate and intentional" act; intent to injure was not required. *See, e.g.*, *Impulsora del Territoria Sur, S.A. v. Cecchini* (*In re Cecchini*), 780 F.2d 1440, 1443 (9th Cir. 1986). An injury was "malicious" if it involved "(1) a wrongful act, (2) done intentionally, (3) which necessarily cause[d] injury, and (4) [was] done without just cause or excuse." *Bammer*, 131 F.3d at 791 (citation and internal quotation marks omitted). Again, "malicious" injury did not require "an intent to injure, but . . . only an intentional act which causes injury." *Id.*

Geiger rejected that analysis, holding that the "willful and malicious injury" exception contemplates "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Geiger*, 523 U.S. at 61 (emphasis in original). As the Fifth Circuit has observed, however, *Geiger* "never makes explicit whether it is analyzing solely the 'willful' prong or the 'willful and malicious' standard as a unit." *Miller*, 156 F.3d at 606.

Apparently for that reason, the Ninth Circuit has given *Geiger* an exceedingly narrow construction—understanding it to leave intact all of the Ninth Circuit's pre-*Geiger* case

law regarding the meaning of "malicious." Accordingly, it has continued to bifurcate the willfulness and malice inquiries, and has continued to employ its pre-*Geiger* definition of "malicious" injury as an intentional wrongful act done without just cause and excuse—without requiring any showing of intent to cause injury to satisfy the "malicious" prong. App. 8a–9a (citing *Bammer*, 131 F.3d at 791). Applying that analysis in this case, the Ninth Circuit concluded that Sicroff's act was "malicious" despite the bankruptcy court's undisturbed finding that Sicroff believed his statements to be true.

This result would have been impossible in the Fifth Circuit, which has given far broader effect to the *Geiger* decision. Prior to *Geiger*, the Fifth Circuit had employed a test for malice very similar to the Ninth Circuit's, under which conduct was "malicious" if it was "without just cause or excuse." *Miller*, 156 F.3d at 605 (quoting *Vickers* v. *Home Indem. Co.*, 546 F.2d 1149, 1150 (5th Cir. 1977)).

After *Geiger*, however, the Fifth Circuit held that *Geiger* had overruled that line of authority. It concluded that, after *Geiger*, "willful and malicious injury" is "a unitary concept," *Miller*, 156 F.3d at 603, and it expressly repudiated its prior definition of malice as lacking "just cause or excuse," *see id.* at 605. Rather, the Fifth Circuit held that an injury is "malicious" within the meaning of § 523(a)(6) only if the act in question was "'done with the actual intent to cause injury.'" *Id.* at 606 (quoting *Geiger*, 523 U.S. at 61); *see also Williams* v. *Int'l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 509 (5th Cir. 2003) ("A debtor acts with implied malice when he acts 'with the actual intent to cause injury.'" (quoting *Miller*, 156 F.3d at 606)).[5] Because a

[5] Under *Miller*, "actual intent" can be inferred where there is either "an objective substantial certainty of harm or a subjective motive to cause harm." *Miller*, 156 F.3d at 606. That is, while *Geiger* holds that the "willful and malicious" standard requires actual intent to cause injury—not mere negligence or recklessness—*Miller* construes that requirement to be satisfied not only where the debtor subjectively intended injury, but also where the "objective certainty" of injury is so patent that the act can be deemed intentional as a matter of law.

speaker who believes his statement to be true cannot intend to cause legal injury, under the Fifth Circuit's reasoning Jett's claim against Sicroff would be dischargeable in Sicroff's bankruptcy.

The Ninth Circuit here expressly acknowledged the conflict of authority and rejected the Fifth Circuit's approach. The panel observed that "at least one other circuit has read *Geiger* to eliminate" the pre-*Geiger* "just cause and excuse" definition of malice, but concluded that "we disagree with that interpretation, which . . . conflates the elements of willfulness and malice in contravention of our clear precedents." App. 10a n.4. Review by this Court is necessary to resolve that square and acknowledged disagreement among the courts of appeals.

B. The decision below also conflicts with the decisions of the Court of Appeals for the Sixth Circuit in *Wheeler* and *Kennedy*, which provide that in order for a claim for libel to be a debt for "willful and malicious injury" the debtor must have been aware that the statements in question were false when he made them. *See Wheeler*, 783 F.2d at 615; *Kennedy*, 249 F.3d at 581, 582–583.

In *Wheeler*, the debtor, Laudani, was found liable in Michigan state court for publishing and distributing a libelous document accusing James and Sheila Wheeler of public corruption. *See Wheeler*, 783 F.2d at 611. On appeal from a finding that the verdict necessarily encompassed a determination that "Laudani acted willfully and maliciously," the

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The Fifth Circuit's decision in *Caton* v. *Trudeau* (*In re Caton*), 157 F.3d 1026 (5th Cir. 1998), reflects this principle. There, the court held that an Illinois default judgment—under which the debtor was deemed to have admitted that he made libelous statements "maliciously and intentionally with full knowledge of their falsity or in complete and reckless disregard of their truth or falsity, for the purpose of injuring and destroying [the plaintiff's] personal and professional reputation"—necessarily determined that "there was a deliberate or intentional injury, precluding discharge under § 523(a)(6), as [the debtor's] libelous statements were objectively substantially certain to result in the injury to [the plaintiff]." *Id.* at 1029, 1030 (citation and internal quotation marks omitted). *Caton* thus exemplifies the situation in which the certainty of injury from a wrongful act is so patent as to warrant deeming the injury "deliberate and intentional."

Sixth Circuit reversed. *Id.* The Sixth Circuit reasoned that the state court libel judgment could have been premised on a mere finding that Laudani's statements were made with reckless disregard as to whether the statements were false, and did not require a finding that Laudani knew the statements were false. *See id.* at 615. But "[m]ere reckless disregard for the truth or falsity of the statement, which can support a libel verdict, is not a willful and malicious injury for purposes of § 523(a)(6)." *Id.* Because the state court had made no determination that Laudani knew his statements to be false, the Sixth Circuit concluded that the debt was not for "willful and malicious injury" and was dischargeable. *See id.*

The Sixth Circuit's subsequent decision in *Kennedy*, also a defamation case, reaffirmed that principle, holding in light of *Geiger* that "only acts done with the intent to cause injury—and not merely acts done intentionally—rise to the level of willful and malicious injury for purposes of satisfying § 523(a)(6)." *Kennedy*, 249 F.3d at 581.[6] Although the *Kennedy* panel found the defamatory statements at issue in that case nondischargeable, it expressly relied on the fact that the debtors "continued to make the statements in question even after receiving clear proof that the statements were false; . . . thus, it is clear that in making the statements, the

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[6] *Kennedy* noted that *Geiger* had superseded aspects of the *Wheeler* decision that are not at issue here. *See Kennedy*, 249 F.3d at 580. Prior to this Court's decision in *Geiger*, the Sixth Circuit was among the courts of appeals that had held that the "willful and malicious injury" standard required only an intentional act that caused injury, and did not require an intentional injury. *See Perkins* v. *Scharffe*, 817 F.2d 392, 394 (6th Cir. 1987). *Geiger* expressly overruled that line of authority. *See Geiger*, 523 U.S. at 60 (noting that its holding was inconsistent with *Perkins*). In *Kennedy*, the Sixth Circuit noted that *Wheeler*, insofar as it recited the prior, more lenient standard for determining nondischargeability, was superseded by *Geiger*. *See Kennedy*, 249 F.3d at 580. But *Kennedy* only strengthened and reaffirmed *Wheeler*'s ultimate holding that a libelous statement could not constitute "willful and malicious injury" if the debtor believed the statement to be true when made.

[debtors] intended injury." *Id.* (quoting district court opinion).[7]

The Ninth Circuit decision below cannot be squared with this reasoning. Here, the bankruptcy court made an express finding of fact—never reversed on appeal—that Sicroff "believed [his] statements were true." App. 27a. Despite that finding, the Ninth Circuit held that Sicroff's statements were both "willful" and "malicious," and were thus nondischargeable. App. 11a.[8]

* * *

Both the Fifth Circuit's reasoning in *Miller* and the Sixth Circuit's reasoning in *Wheeler* and *Kennedy* reflect the same basic principle: that a debtor acting under an "honest,

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[7] Other lower courts—both before and after *Geiger*—have also held that one who publishes a false statement without knowledge of its falsity cannot have committed a willful and malicious injury. *See, e.g., M & I Heat Transfer Prods., Ltd.* v. *Gorchev* (*In re Gorchev*), 275 B.R. 154, 167 (Bankr. D. Mass. 2002) (holding that state court judgment for libel did not establish that the debt was nondischargeable under § 523(a)(6) because "[n]egligence in ascertaining truth or falsity is all that was required [to support the libel verdict], and that is not enough to make the resulting injury malicious"); *Pagones* v. *Mason* (*In re Mason*), 1999 WL 58579, at *3 (Bankr. S.D.N.Y. Jan. 28, 1999) ("The intentional tort of defamation may constitute 'willful and malicious injury' . . . as long as the debtor knew the published statements were false." (citing *Wheeler*)); *Thompson* v. *Durrance* (*In re Durrance*), 84 B.R. 238, 239 (Bankr. M.D. Fla. 1988) ("[D]efamation may constitute 'willful and malicious injury . . .' as long as the Debtor knew the published statements were false." (citing *Wheeler*)); *Materia* v. *Pereira* (*In re Pereira*), 44 B.R. 248, 251 (Bankr. D. Mass. 1984) ("Malice in the bankruptcy sense means that the author knew the statements made were false. . . . Reckless disregard for the truth or falsity of a statement does not meet the standard of willful and malicious injury.").

[8] Over twenty-five years earlier—in a decision interpreting the predecessor to the Bankruptcy Code, the Bankruptcy Act of 1898—a panel of the Ninth Circuit had stated that, for purposes of determining the dischargeability of a claim of libel, "[w]hen injury is caused by false statements, . . . 'willfulness' denotes that the speaker knew his statements were false." *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio S.p.A.* v. *Kasler* (*In re Kasler*), 611 F.2d 308, 310-311 (9th Cir. 1979). The decision below can only be understood as having repudiated this aspect of *Kasler*'s analysis. In doing so, it conflicts with the decision of the Fifth Circuit in *Miller* and those of the Sixth Circuit in *Wheeler* and *Kennedy*.

but mistaken belief" "cannot be said to have intentionally caused injury," and that the resulting debt thus cannot be for "willful and malicious injury." *Miller*, 156 F.3d at 606 (citation and internal quotation marks omitted). By holding Sicroff's debt nondischargeable despite the undisturbed factual finding that he was under an "honest, but mistaken belief" as to the truth of his statements, the Ninth Circuit rejected that principle and clearly broke with both the Fifth and Sixth Circuits' reasoning. There is no doubt that under the law of those circuits, Sicroff's debt for libel would have been discharged in his bankruptcy. This division of authority is clear, square, and acknowledged. It cannot be resolved absent this Court's intervention.

II. THE DECISION BELOW CONFLICTS WITH AND UNDERMINES THIS COURT'S DECISION IN *KAWAAUHAU* V. *GEIGER*

The Ninth Circuit's decision also conflicts with the clear import of this Court's decision in *Kawauuhau* v. *Geiger*, and undermines the rule articulated in that decision.

In *Geiger*, this Court addressed the question whether a debt is nondischargeable when it arises out of an act that was done intentionally and caused injury, or only when it arises out of an act done with the actual intent to cause injury. *Geiger*, 523 U.S. at 61. This Court adopted the latter construction, holding that the statute contemplates "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Id.* (emphasis in original). For this reason, the Court explained, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)," even where the acts that gave rise to those injuries were intentional ones. *Id.* at 64.

But that is all that the record here reflects. As the Ninth Circuit observed, California law defines libel simply as "a false and unprivileged publication by writing [or other means], which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." App. 6a (quoting Cal. Civ. Code § 45). Under California law, a libel verdict in a case involving a private-figure

plaintiff requires no more than a showing that the speaker was negligent as to the truth or falsity of his statements. *See Brown* v. *Kelly Broad. Co.*, 771 P.2d 406, 425 (Cal. 1989).[9]

Here, the bankruptcy court expressly found that Sicroff believed his statements were true, and that finding was undisturbed on appeal. Nor did any of the courts below ever intimate that Sicroff's belief in the truth of his statements was more than negligent—or even suggest that the record could support such a finding.

The Ninth Circuit panel below found that the libelous statements were "willful" based only on Sicroff's concession that the act of publication was an intentional one. App. 8a. As the district court had explained, the record before the bankruptcy court showed nothing more than "willful *publication*"; Jett "did not even attempt" to disprove Sicroff's "belief in [the] truthfulness" of his statements and thus show willful *injury*. App. 20a–21a (emphasis added).

The panel then went on to apply its pre-*Geiger* case law on the meaning of "malicious," focusing—as if *Geiger* had never been decided—on whether the *act* was intentional and wrongful, not on whether the debtor intended to cause legally cognizable *injury*. App. 8a–10a. The panel's reasoning displays a fundamental misunderstanding of the scope and import of *Geiger*, which should have been understood to overrule prior case law—like that relied on by the Ninth Circuit here—that failed to comport with *Geiger*'s focus on the debtor's intent to cause injury. And the resulting decision, which holds a debt for a negligently made libelous statement nondischargeable in bankruptcy, simply cannot be squared with *Geiger*'s holding that negligently—or even recklessly—inflicted injuries are not "willful and malicious" within the meaning of § 523(a)(6).

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[9] While the statute by its terms would impose strict liability for libel, in view of this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the California Supreme Court has construed the statute to require private-figure plaintiffs to show that the defendant was at least negligent as to truth or falsity. *Brown*, 771 P.2d at 425.

* * *

This case presents an excellent opportunity for this Court not only to correct the manifest error committed by the Ninth Circuit below, but also, more broadly, to resolve the abiding confusion among the lower courts regarding the meaning and scope of *Geiger*. The issue is of national importance: the question of how to construe the "willful and malicious" exception to discharge arises regularly in bankruptcy courts around the country. And the expansive construction accorded to that provision by the Ninth Circuit will have the effect of denying many debtors who never intended to commit a legal wrong the fresh start promised by the bankruptcy laws.

Moreover, the Ninth Circuit's reasoning will have a particularly troublesome effect in libel cases. Although states are constitutionally permitted to impose liability for libel in cases where the plaintiff is a private figure based on a mere showing of negligence, *see Gertz*, 418 U.S. at 347, that rule necessarily has a chilling effect on speech and debate.[10] Aggravating the punishment for statements that are merely negligent by denying such an honest, but mistaken debtor the benefit of the discharge only exacerbates that damage to First Amendment values.

This Court should accordingly grant review of the decision below to resolve the confusion among the courts of appeals on this important issue and to clarify that *Geiger*—which expressly held that neither negligence nor recklessness amounted to a "willful and malicious" injury—precludes holding debts from negligently made libelous statements to be nondischargeable in bankruptcy.

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[10] It is for that reason that this Court has held that presumed or punitive damages may not be awarded in cases of libel involving matters of public concern based only on a showing of negligence as to the truth or falsity of the matter asserted. *See Gertz*, 418 U.S. at 349-350.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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